[redacted]

IN THE UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

[redacted]

Appellant,

vs.

UNITED STATES OF AMERICA,

Appellee.

[redacted]

MAR 10 1965

FILED

[redacted]

APPELLANT'S OPENING BRIEF

APPEAL FROM
THE UNITED STATES DISTRICT COURT
FOR THE CENTRAL DISTRICT OF CALIFORNIA

WM. MATTHEW BYRNE, JR.
United States Attorney

ROBERT L. BROSIO
Assistant U.S. Attorney
Chief, Criminal Section

EDWARD R. FRANK
Assistant U.S. Attorney

1750 U.S. Court House
312 North Spring Street
Los Angeles, California 90012

Attorneys for Appellee
United States of America

NO. 22758

IN THE UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

LONZO NUTTER,

Appellant,

vs.

UNITED STATES OF AMERICA,

Appellee.

APPELLEE'S OPENING BRIEF

APPEAL FROM
THE UNITED STATES DISTRICT COURT
FOR THE CENTRAL DISTRICT OF CALIFORNIA

WM. MATTHEW BYRNE, JR
United States Attorney

ROBERT L. BROSIO
Assistant U.S. Attorney
Chief, Criminal Division

HOWARD B. FRANK
Assistant U.S. Attorney

1200 U.S. Court House
312 North Spring Street
Los Angeles, California 90012

Attorneys for Appellee
United States of America

TOPICAL INDEX

TABLE OF AUTHORITIES

Constitution

Statutes

NO. 22758

IN THE UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

LONZO NUTTER,

Appellant,

vs.

UNITED STATES OF AMERICA,

Appellee.

APPELLEE'S OPENING BRIEF

I

QUESTIONS PRESENTED

1. Is Title 21, United States Code, §174 unconstitutional, in that:

(A) the provision referring to "unexplained possession of a narcotic drug is sufficient evidence to authorize a conviction" shifts and changes the burden of proof?

(B) the provision referring to "unexplained possession of a narcotic drug is sufficient evidence to authorize a conviction"

deprived defendant of his right to silence?

(C) the phrase "to the satisfaction of the jury" is uncertain?

(D) this section deprived defendant of his right to equal protection of the law?

(E) there is no rational connection between the fact proved (possession of heroin) and the facts presumed (knowledge of illegal importation)?

2. Did the fact that the defendant's prior felony conviction for selling heroin was brought out deprive the defendant of due process?

3. (A) Was the limitation imposed by the court on the permissible scope of examination by defense counsel of William Davis, a denial to the defendant of his right to confront a witness against him so as to violate the defendant's Sixth Amendment rights?

(B) Did the court err in refusing to allow the defendant to treat Mr. Davis as a hostile witness and question him as if he were on cross examination?

4. Is the Government's failure to disclose the identity of the informant prior to trial a violation of the defendant's Sixth Amendment rights?

II

STATEMENT OF FACTS

On June 6, 1967, one William Jackson was employed by an agent for the Federal Bureau of Narcotics [R. T. 58]. [1/]

On June 6, 1967, Mr. Jackson met for the first time, the defendant LONZO NUTTER [R. T. 59] Mr. Jackson was introduced to the defendant by one Bill Davis, an informant for the Federal Bureau of Narcotics, at the home of Mr. Davis [R. T. 60].

Shortly after the introduction, Agent Jackson and the defendant proceeded to the kitchen of Mr. Davis' house, where Agent Jackson asked the defendant, "What have you got?" The defendant removed a small package wrapped in tinfoil from his pocket and handed it to Agent Jackson, who then opened the package. Agent Jackson observed the contents of the package to be two condoms, each of which contained a quantity of tan powder [R. T. 60, 61]. These two condoms were part of Government's exhibit No. 1B introduced into evidence [R. T. 77].

Agent Jackson said, "It looks all right. How much do you want for it?" The defendant replied, "It's a good half-ounce I want $350.00."

Agent Jackson then stated, "Well, I don't have that much

1/ "R. T." refers to Reporter's Transcript.

money. I can pay $345.00 for it " Whereupon the defendant responded, "All right. I will let you have it at this time for $345.00." [R.T. 61]

Agent Jackson retained possession of the two condoms and gave the defendant $345 00 Jackson then said, "I need some more stuff in a few days" and the defendant replied that he was "always available and always had stuff", and that Agent Jackson should get in touch with Bill Davis who would know how to reach him [R.T. 61].

On June 12, 1967, Agent Jackson once again met with the defendant. This meeting took place in front of 543 Crocker Street, Los Angeles [R.T. 67]. When Agent Jackson arrived at this location, the defendant then entered the vehicle in which Mr Davis was driving and Agent Jackson was a passenger [R.T. 68]. Agent Jackson asked the defendant what he had and the defendant replied that he had three ounces for which he wanted $1050.00. Agent Jackson said that this was a lot of money and that he first would have to see what he was buying [R.T. 68, 69].

The defendant then left the vehicle and after a short while returned, and once again entered the vehicle where he handed Agent Jackson a box [R.T. 69]. Agent Jackson opened the box and removed six condoms, each containing q quantity of a tan colored powder [R.T. 64]. These six condoms were introduced into evidence as Government's Exhibit Number 2 [R.T. 82].

After observing the contents of the condoms, Agent Jackson said, "It looks all right, but I couldn't pay $1050.00 for

it." The defendant inquired, "What could you do?" Agent Jackson stated, "About $900.00 is the best I can pay for it" [R.T. 69]. This was agreeable to defendant and Agent Jackson then explained that he did not have that much money with him and that he would have to go to his bank to get the money [R.T. 69].

Agent Jackson, the defendant, and Mr. Davis proceeded to Jackson's bank at 9th and Main Streets, Los Angeles, where the defendant was arrested after Agent Jackson gave a pre-arranged signal to other narcotics agents who were on surveillance. Incident to the arrest, the defendant was searched and the six condoms, introduced into evidence as Government's exhibit Number 2B [R.T. 82], were found in the defendant's pocket [R.T. 80].

At no time did the defendant request or obtain from Agent Jackson an order on a form issued for the purpose of selling heroin by the Secretary of the Treasury [R.T. 73].

The contents of the condoms in Government's exhibits One and Two were analyzed and determined to contain heroin [R.T. 104].

Mr. William Davis had been arrested for violating the Federal Narcotic Laws in December 1966 [R.T. 147], but had not been prosecuted as yet [R.T. 154].

Counsel for defendant sought to inquire into the details of the narcotic offense for which Mr. Davis was arrested and was precluded from doing so by the court. The court ruled that "materiality is the key issue; and I can't see where the details

of this offense are material " [R. T. 149].

The defendant took the stand and testified in his own behalf [R. T. 163]. On cross examination, the defendant was asked if he had ever been convicted of a felony involving narcotics [R. T. 178]. A stipulation was then entered into that in 1959, the defendant was convicted of willfully, unlawfully and feloniously selling, furnishing and giving away a narcotic, to wit, heroin [R. T. 179, 180].

An objection had been raised by defendant to the Government's inquiry as to the nature of the felony. However, the objection was overruled. The court pointed out that the defense indicated they would rely on entrapment and that in view of this defense "the prior conviction of a felony may, wholly apart from its impeachment admissibility, have relevance and materiality." The court indicated that when entrapment is raised the jury must consider facts relating to the defendant's disposition, willingness to commit the crime, or whether he was induced or persuaded [R. T. 133].

III

ARGUMENT

TITLE 21, UNITED STATES CODE, SECTION 174 IS CONSTITUTIONAL

A. The provision which reads " . . . unexplained possession of a narcotic drug is sufficient evidence to authorize a conviction . . . " does not shift or change the burden of proof.

The statute and the presumption merely have the effect of shifting to the defendant the burden of going forward with evidence, i.e. with his defense. The burden of proof is always with the Government to prove the defendant's guilt beyond a reasonable doubt.

Roviard v. United States,
353 U.S. 53, 63 (1957);
Chavez v. United States, 343 F.2d 85
(9th Cir. 1965);
Gonzalez v. United States, 162 F.2d 870
(9th Cir. 1947).

B. The provision which reads " . . . unexplained possession of a narcotic drug is sufficient evidence to authorize . . . " does not deprive the defendant of his Fifth Amendment right against self-incrimination. The defendant's right to remain silent is not infringed upon.

The defendant is neither required nor forbidden to testify by Title 21, United States Code, §174. The argument that this

section violates the defendant's Fifth Amendment rights has been repeatedly rejected for many years. Indeed in Yee Hem v. United States, 268 U.S. 178, 185 (1925), the Supreme Court held:

> "The point that the practical effect of the statute creating the presumption is to compel the accused person to be a witness against himself may be put aside with slight discussion. The statute compels nothing. It does no more than to make possession of the prohibited article prima facie evidence of guilt. It leaves the accused entirely free to testify or not as he chooses. If the accused happens to be the only repository of the facts necessary to negative the presumption arising from his possession, that is a misfortune which the statute under review does not create but which is inherent in the case. The same situation might present itself if there were no statutory presumption and a prima facie case of concealment with knowledge of unlawful importation were made by the evidence. The necessity of an explanation by the accused would be quite as compelling in that case as in this; but the constraint upon him to give testimony would arise there, as it arises here, simply from the force of circumstances and not from any form of compulsion forbidden by the Constitution."

In United States v. Gainey, 380 U.S. 63, 70 (1965), the District Court instructed the jury regarding the statutory provisions authorizing the inference of guilt from the defendant's unexplained presence at a still site in a case where the defendant was convicted of illegal possession of a still. The Circuit Court held:

> "We do not consider that the single phrase 'unless the defendant by the evidence in the case and by proven facts and circumstances explains such presence to the satisfaction of the jury' can be fairly understood as a comment on the petitioner's failure to testify."

In Orojio-Vasquez et al. v. United States, 344 F.2d 827 (9th Cir. 1965), the court pointed out that the contention that the provision in Title 21, United States Code, §174 requiring the defendant to explain possession of narcotics is unconstitutional and violates the defendant's Fifth Amendment rights against self-incrimination had been repeatedly held to have been without merit See also:

Brown v. United States, 370 F.2d 374 (9th Cir. 1963);

Agobian v. United States, 323 F.2d 693 (9th Cir. 1963);

Cellino v. United States, 276 F.2d 941 (9th Cir 1960);

Yee Hem v. United States, supra.

C. The phrase "to the satisfaction of the jury" is not unconstitutional because of uncertainty or vagueness. This phrase is not unconstitutional on the grounds asserted that the jury is authorized to adjudge its satisfaction of an explanation given upon its own whim or reason without any standard or measurement and thus unlawfully delegates a legislative function.

In Gonzalez v. United States, supra at 871, the court held that:

> " . . . satisfaction of the jury, as to the explanation, turns upon whether or not the possession was within the exceptions provided in the statutes. The standard is plainly set forth."

See also:

Brown v. United States, supra;

Chavez v. United States, supra.

D. This section does not deprive the defendant of his right to equal protection of the law. As previously cited, Title 21, United States Code, has consistently been held to be constitutional. It is respectfully submitted that there is no merit to the defendant's contention that by virtue of the statute and the presumption he is deprived of equal protection in that he must prove

or explain to the satisfaction of the jury.

E. There is a rational basis between the fact proved (possession of heroin) and the fact presumed (knowledge of illegal importation). The Supreme Court of the United States, as well as the Ninth Circuit, has repeatedly held that there is a rational basis for the statutory presumption in Title 21, United States Code, §174 and that this presumption does not violate the defendant's constitutional rights.

Yee Hem v. United States, supra;

United States v. Gainey, supra;

Ramirez v. United States, 350 F. 2d 306 (9th Cir. 1965);

Pool v. United States, 344 F. 2d 943 (9th Cir. 1965);

Morales v. United States, 344 F. 2d 846 (9th Cir. 1965).

IT WAS NOT REVERSIBLE ERROR FOR THE TRIAL COURT TO ALLOW THE FACT OF PRIOR CONVICTIONS, EVEN IF FOR THE SAME TYPE OFFENSE, TO BE USED TO IMPEACH THE DEFENDANT'S CREDIBILITY.

Defendant contends that informing the jury that he previously had been convicted for selling heroin was so prejudicial as to deny him due process of law.

There is little doubt that from the time that the defendant first claimed he was "framed" by an informer and a narcotics agent [R.T. 32] and defense counsel opened argument by stating "the defense is one of entrapment" [R.T. 56], through the examination of the allegedly entrapping informant [R.T. 146-164], and cross examination of the narcotics agent [R.T. 82-92], the presentation of Dr. Mittman to testify to the allegedly easily overborne weak will of the defendant [R.T. 125, 127-29], and through defendant's own testimony [R.T. 164-75], the defense wholly revolved around the issue of entrapment. In this context, and in line with the government's burden of proof on the entrapment issue, the prior conviction was admitted [R.T. 131-134].

Once the defense raises the entrapment issue, the government may conduct a searching inquiry into the defendant's past in order to show predisposition of the defendant for this illegal type of behavior and the attendant reasonableness of the government's activities. Sherman v. United States, 356 U.S. 369 (1958); Sorrells v. United States, 287 U.S. 435 (1932). There is

no question but that, not only was the prior conviction for sale of heroin admissible as strong evidence of predisposition to commit such acts, but the government was under an affirmative duty to present this type of evidence or risk acquittal based on entrapment. See Notaro v. United States, 363 F. 2d 169 (9th Cir. 1966).

Defendant's trial counsel placed his faith in the entrapment issue. Since the defendant apparently denied willful connection with narcotics and hardly showed government importuning [R. T. 186-190], it became evident at the end of the presentation of evidence that this defense was not very propitious. Nevertheless, prompted by defense counsel's arguments, the trial judge agreed that the entrapment instruction should be given [R. T. 213]. Soon after this ruling, defendant's counsel stated:

> "To tell you the truth, your Honor, the way this case has developed and the way the evidence has come in, I am not totally convinced that the -- and I know this is going to sound funny -- entrapment instruction should be given at all.
>
> "I have had time to think about it, and I have reflected about it; and you have had time to think about it and change your mind the other way. But the more I think about it -- . . .
>
> "Well, I will tell you -- and I am being very frank with the court, and also with Mr. Gargaro -- I feel that the previous felony conviction for

selling heroin, if it is considered by the jury on anything except the defendant's credibility, I think it is going to completely destroy any case that we have presented. And I am not sure in my own mind that the entrapment instruction is that helpful to the defendant under the facts as they came out. Very frankly, I am going to argue knowledge. I am not planning to argue entrapment at all.

"THE COURT: Then you are up against a decision to make, and that is whether to withdraw the request for an entrapment instruction." [R. T. 215-216].

The defense counsel then requested the court not to give the entrapment instruction [R. T. 217]. The court complied, noting that the prior conviction would now have effect only on the issue of credibility, a proposition to which defense counsel expressed agreement [R. T. 21, 220].

Although defense counsel earlier had objected to admitting evidence that the prior conviction was for the sale of heroin, the changed complexion of the case, prompted by defense counsel, compelled the judge to assess this question in the entirely different context of the case without the entrapment issue. Defense counsel's agreement with the judge's decision militates for a finding that no timely objection was made.

Once the defendant takes the stand, the fact of his prior convictions may be used to impeach his credibility. See Spencer v. Texas, 385 U.S. 554 (1967).

Recently the United States Court of Appeals for the District of Columbia circuit enunciated what has become probably the strictest rule among the circuits on admissibility of prior convictions. Luck v. United States, 348 F.2d 763 (D.C. Cir. 1965) Luck held that the court is not required to always allow impeachment by prior convictions. Rather, sound judicial discretion must be applied to weigh the prejudicial effect of impeachment against the probative relevance of the prior conviction to the issue of credibility; a discretion that "is to be accorded a respect appropriately reflective of the inescapable remoteness of appellate review." 348 F.2d at 769. Subsequent to Luck, that court interpreted the applicable rule to mean that for the trial court to disallow a prior conviction the court must find that the prejudice "far outweighs" the probative value. Gordon v. United States, 383 F.2d 936, 939 (D.C. Cir. 1967).

Thus, even under the strict rule, it is at least a matter of judicial discretion to allow impeachment by prior convictions. That this impeachment is proper is well-established in this Court. Singleton v. United States, 381 F.2d 1, 4 (9th Cir.)., cert. denied 389 U.S. 1024 (1967); Helberg v. United States, 365 F.2d 314, 316 (9th Cir. 1966), cert. denied 385 U.S. 1010 (1967); Bohol v. United States, 227 F.2d 330, 331 (9th Cir. 1955); Shockley v. United States, 166 F.2d 704, 717 (9th Cir.), cert. denied 334

U.S. 850 (1948), United States v. Cisneros, 191 F. Supp. 924, 927 (N.D Cal. 1961), Aff'd 322 F. 2d 948 (9th Cir 1963).

Applying the rules on impeachment to this case, defendant's contentions must fail, even under the strict view of admissibility. Thus, in a case where the entrapment defense fell through at the end of the evidence and the judge ruled that several prior narcotics convictions were admissible to impeach a defendant in a narcotics case, the United States Court of Appeals for the District of Columbia circuit upheld the trial judge's exercise of discretion. Brooke v. United States, 385 F. 2d 279 (D.C Cir 1967). And the fact that the prior conviction was for the same, or almost the same offense as the one at trial does not preclude its admissibility to impeach. See Williams v. United States, 394 F. 2d 957 (D.C. Cir. 1968) (robbery), Gordon v. United States, supra (robbery); Brooke v. United States, supra (narcotics); Beam v. United States, 378 F. 2d 937 (5th Cir. 1967) (Possession of non tax-paid whiskey). And impeachment by similar prior convictions has long been allowed by this court. Bohol v. United States, supra (narcotics); Shockley v. United States, supra (murder); Cisneros v. United States, supra (narcotics).

Nor does the fact that the acts were remote in time although a factor to consider, preclude the exercise of this discretion. Palumbo v. United States, 401 F. 2d 270 (2d Cir. 1968) (several crimes extending back 38 years); United States v. Plata, 361 F 2d 958 (7th Cir.), cert. denied 385 U.S. 841 (1966) (eleven-year old

conviction), United States v. Bell, 351 F. 2d 868 (6th Cir. 1965), cert. denied 383 U.S. 947 (196) (twenty-year old conviction). Thus, in the present case, an eight-year old convictions admission could hardly have equated with an abuse of discretion.

In a case such as this, which even the defense counsel eventually posed as simply raising the issue of credibility [R. T. 225-26, 231], it is especially compelling that all avenues be explored which would shed light on which of the witnesses was to be believed. See Palumbo v. United States, supra, at 274, Brooke v. United States, supra, at 280; Gordon v. United States, supra, at 941.

THE COURT'S LIMITATION ON THE SCOPE OF EXAMINATION BY DEFENSE COUNSEL OF WILLIAM DAVIS DID NOT DENY THE DEFENDANT ANY CONSTITUTIONAL RIGHT.

A. Mr. William Davis, the Government informer in the instant case, was called as a witness by the defense [R. T. 146]. Mr. Davis testified that he had been arrested in December, 1966, for a narcotic offense [R. T. 147]. Defense counsel asked Mr. Davis to relate what had occurred that caused him to be arrested. The court then interposed its own objection [R. T. 147].

In a discussion at the bench outside the presence of the jury there was mention of the witness' right to silence regarding a pending case against him. More significantly however, is the

fact that the court stated such an inquiry was immaterial [R. T. 148]. The court said, "I have a real problem about the immateriality of that detail . . . " [R. T. 149].

When counsel for the defendant asserted that his client was being prejudiced due to the court's intent to protect the rights of the witness, the court pointed out with reference to the circumstances that led to the arrest of Mr. Davis: "The immateriality is the key issue and I can't see where the details of this offense are material." [R. T. 149].

It is clear that this situation is merely the court's imposing its own objection on the basis of the line of questioning being immaterial. In so doing there was no infringement of any sort on any constitutional right of the defendant.

The ruling on the material or immaterial nature of evidence is within the discretion of the court. The court will be reversed only if there is an abuse of discretion. Mims v. United States, 254 F. 2d 654 (9th Cir. 1958); Wilson v. United States, 250 F. 2d 312 (9th Cir. 1958).

Mims v. United States, supra, was a case involving the sale of heroin in which the District Court curtailed the questioning of a witness. On appeal the Circuit Court held (P. 658):

> "The District Court's refusal to permit the defendant to 'try' the Reverend Mr. Powell, a police informant, because Mims was supposedly unhappy in engaging in business with him, is alleged to be fatal error requiring reversal of

defendant's conviction.

"We think not. Defendant was permitted to tell his 'valid reason' as to why he went to the premises where the sale took place. Mr. Powell was present in the courtroom at the request of the Government, though not called as a Government witness. Defendant could have called him had he desired. The discretion of a trial court is large as to how and when bias may be proved and what collateral evidence is material. (Emphasis We do not think the trial court abused that discretion . . . "

The instant case involves nothing more than the court properly exercising its discretion in ruling that the intended line of questioning directed to Mr. Davis was not material.

B. There was no error precluding the defendant from treating Mr. Davis as a hostile witness and therefore taking him on cross examination.

Before permitting counsel to treat his own witness as if on cross examination the court must be satisfied that the witness is in fact hostile or did in fact render testimony which constituted surprise. Such a decision is strictly within the court's discretion and of course will be grounds for reversal only if there is an abuse of discretion. See United States v. Krahanes, 317 F. 2d 459 (2nd Cir. 1963); Breber v. United States, 276 F. 2d 709 (9th Cir. 1960).

In the instant case the defense called as its witness Mr.

William Davis, the Government informer. Mr. Davis testified that he was arrested for narcotics in December, 1966, that he was released on bond several days after being arrested and that he became an informer for the Federal Bureau of Narcotics [R. T. 147-157]. After the attorney for the Government objected to defense counsel asking Mr. Davis if he framed the defendant, counsel approached the bench for a brief discussion. Counsel for the defense asserted that Mr. Davis was a hostile witness and therefore he should be able to cross examine him [R. T. 158].

The court stated, "I have seen no evidence of hostility . . . " Defense counsel suggested that the mere fact that Mr. Davis was an informer against the defendant was sufficient. However, the court held otherwise and stated, "I have my doubts about it. We will rule on the individual questions and objections as they are presented . . . " From that point on there was not even one objection by the Government which was sustained by the court with reference to the examination of Mr. Davis by defense counsel [R. T. 159-162]. Therefore, even if the court's ruling was error it surely was harmless since it had no effect at all on the subsequent examination conducted by counsel in which all questions posed were answered without one objection being sustained.

In effect the court's ruling was not final. The ruling was that each individual question would be considered and if there was any indication of hostility defense counsel would have been allowed to proceed as if on cross examination.

FAILURE OF THE GOVERNMENT TO DISCLOSE IDENTITY OF INFORMER PRIOR TO TRIAL DOES NOT VIOLATE DEFENDANT'S CONSTITUTIONAL RIGHTS

The defendant contends he was deprived of a fair trial because the government failed to inform defense counsel prior to trial of the identity of the informant, Davis. This contention is somewhat startling in view of the fact that the defendant had known Davis very well for seven years [R.T. 156], and knew at all times that he was a precipient witness. Moreover, all that defendant can refer to in order to show a request for this information is defense counsel's assertion that he asked the prosecution for the informant's name at some unspecified time. [Brief for appellant at 11]. No motion or formal request of any kind was made, precluding this issue on appeal. That no motion was made is understandable in light of the fact that defense counsel could simply have asked his client for the informant's name. The government was no more knowledgeable in this matter than was the defendant. In fact, the informant was eventually called as a defense witness [R.T. 146].

Another defect in defendant's contention is that, except for vague allusions as to possible aid, defendant does not show how he was prejudiced by this alleged defect.

Even if we were to stretch logic and assume that a proper request was made that this information was necessary in order to discover identity, and that prejudice resulted from non-disclosure,

statute and case law contradict defendant's claimed right to this information.

Title 18, United States Code, §3432 provides that the government must provide a list of witnesses only where the defendant is charged with treason or other capital offense. It has thus long and unanimously been held that the Government does not have to reveal its witnesses in the usual non-capital case such as this one:

United States v. Van Duzee, 140 U.S. 169, 173 (1891);

United States v. Chase, 372 F.2d 453, 466 (4th Cir. 1967), cert. denied 387 U.S. 907 (1967);

Cordova v. United States, 303 F.2d 454 (10th Cir. 1962);

Dean v. United States, 265 F.2d 544 (8th Cir. 1959).

Hamer v. United States, 259 F.2d 274, 279 (9th Cir. 1958);

Brown v. Johnston, 126 F.2d 727 (9th Cir. 1942), cert. denied 317 U.S. 627 (1943);

United States v. Westmoreland, 41 F.R.D. 419, 427 (S.D. Ind. 1967);

Smith v. United States, 216 F. Supp. 809, 812 (S.D. Cal. 1961);

United States v. Schneiderman, 104 F. Supp. 405, 408 (S.D. Cal. 1952).

A logical inference arises that since Congress so limited the witness list requirement, they intended that in other cases the requirement is not applicable. See United States v. Margeson, 261 F. Supp. 628 (E.D. Pa. 1966). Thus, as this Court has pointed out, if this limit is to be changed, the remedy is with Congress and not with the courts. Hamer v. United States, 259 F. 2d 274, 279 (9th Cir. 1958).

The primary justification for non-disclosure lies in the fact that, in any criminal case, witnesses are subject to great pressures from those who feel threatened by their testimony. See United States v. Estep, 151 F. Supp. 668, 673 (N. D. Tex. 1957); United States v. Bryson, 16 F. R. D. 431, 436 (N. D. Cal 1954). A fortiori, in this case, where an informant was to testify against an old acquaintance, the possibility of intimidation leading to harm or refusal to testify was significant. See United States v. Estep, supra, at 673.

Deliberate suppression of evidence which might clearly operate in favor of a defendant would constitute a violation of due process. Thus where witnesses are hidden by the government and it is shown that their testimony may well be exculpatory, such suppression of evidence by the government may be forbidden in an appropriate case. Compare Giles v. Maryland, 386 U.S 66 (1967); Brady v. Maryland, 373 U.S. 83 (1963); Lessard v Dickson, 394 F. 2d 88 (9th Cir. 1968); Lee v. United States, 388 F. 2d 737 (9th Cir. 1968); Thomas v. United States, 343 F. 2d 49 (9th Cir. 1965). No suppression nor exculpatory evidence

was present in this case.

Discovery of evidence in the hands of the government is being liberalized to an extent, but in no way is this trend, if it be such, directed towards the production of witness lists. Of the cases cited by the defendant, Miller v. Pate concerns the knowing use of fabricated evidence; Giles and Brady relate to suppression of exculpatory evidence, and the Dennis decision rests on an interpretation of an unrelated procedural rule limited to a showing of "particularized need" for Grand Jury minutes. Dennis v United States, 384 U.S. 855 (1966). In no way do these cases even intimate that discovery of witnesses such as Davis is constitutionally required.

IV

CONCLUSION

For the foregoing reasons it is respectfully submitted that the decision of the trial court should be affirmed.

Respectfully submitted,

WM. MATTHEW BYRNE, JR.
United States Attorney
ROBERT L. BROSIO
Assistant U.S. Attorney
Chief, Criminal Division
HOWARD B. FRANK
Assistant U.S. Attorney

Attorneys for Appellee,
United States of America